Supreme Court, U.S.
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(2)

No. 90-1246

In The

Supreme Court of the United States

October Term, 1990

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JOSE ROBERTO CAÑAS-SEGOVIA, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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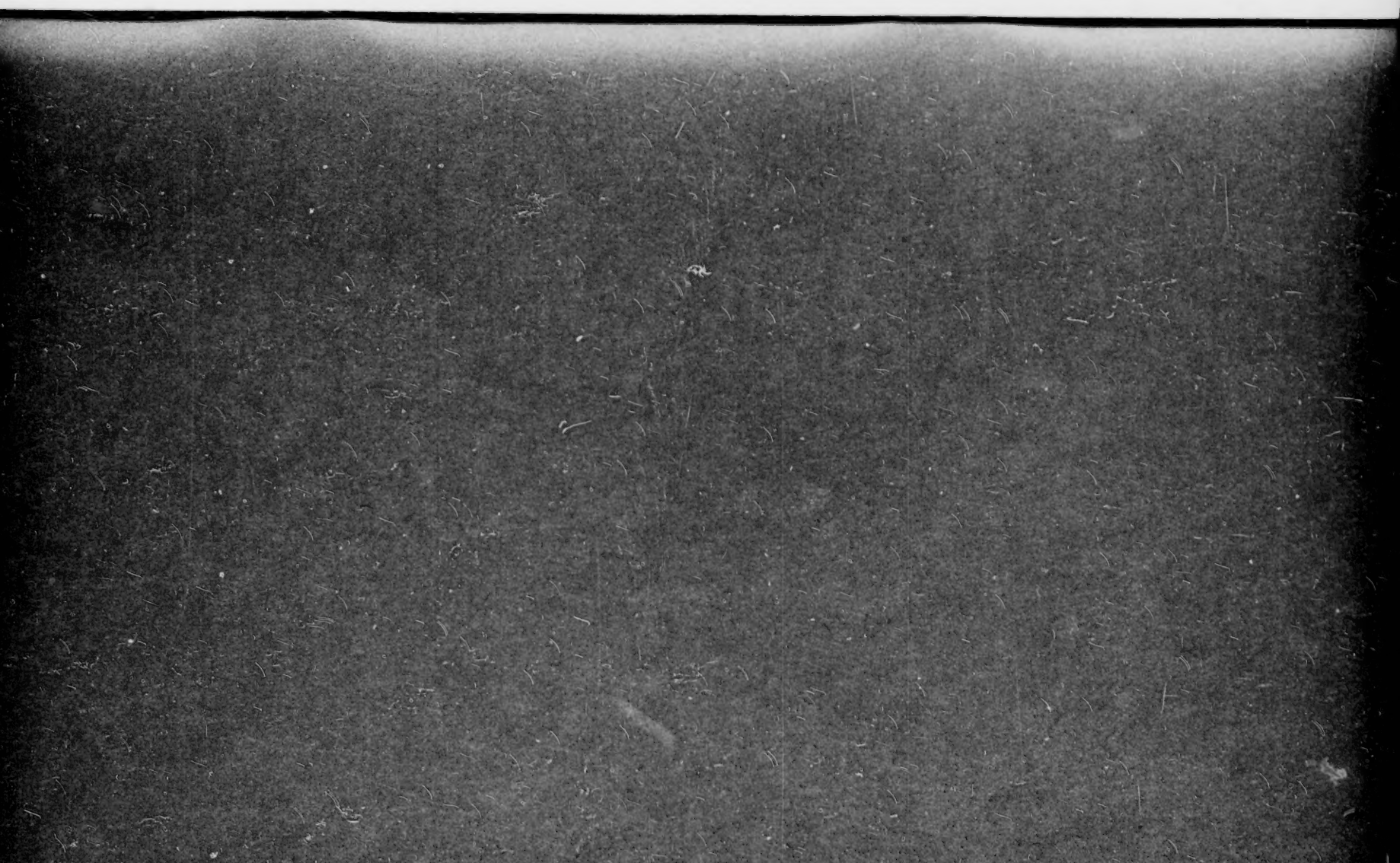

QUESTION PRESENTED

Does the lengthy imprisonment, disappearance, torture, or assassination of a conscientious objector for his refusal to serve in the military constitute (1) persecution or a threat to life or freedom on account of religion or, (2) persecution or a threat to life or freedom on account of imputed political opinion, within the meaning of the 1980 Refugee Act?

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STATEMENT

Respondents Jose and Oscar Cañas-Segovia are natives of El Salvador. On January 24, 1985, at the ages of 16 and 17, respectively, they fled El Salvador to avoid forcible recruitment into the Salvadoran military. Administrative Record (hereinafter "AR") 143-145, 149-151. The Cañas brothers are sincere Jehovah's Witnesses. Appendix to Petitioner's Petition for a Writ of Certiorari (hereinafter "Pet.'s App.") 54a-55a. A central tenet of their religion is non-participation in military service in any form. AR 532-533.

Military service is obligatory for all Salvadorans between the ages of eighteen and thirty. AR 93. Although there are written procedures requiring young men to report for duty, the actual practice is one of forcible recruitment affecting primarily the sons of the poor, and often includes the round-up of teen-age boys well below the legal age. AR 95-97, 131, 133, 538-540.

Salvadoran law does not provide for conscientious objection to military service, and individuals who refuse to serve are punished as deserters. AR 567, 572. The legal penalties for refusing to perform military service range from six months to fifteen years imprisonment,[1]

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[1] The Petitioner asserts that the term of imprisonment is unclear. Petition for Writ of Certiorari (hereinafter "Pet.") 5, n.1. The term of imprisonment is codified in the *Codigo de Justicia Militar y Ley de Procedimientos Penales Aplicables Al Suspenderse Las Garantias Constitucionales* art. 137-139 (1986) (El Salv.). The relevant articles were submitted as Appendix C to the Cañases' Opening Brief to the Ninth Circuit Court of Appeals.

depending upon the circumstances. In addition to the legal penalties, individuals who refuse to perform service are presumed to be disloyal to the government, and are often disappeared, tortured or assassinated. AR 114-130, 166-195, 388-400, 421-422, 483-484.

Jose and Oscar Cañas-Segovia entered the United States without inspection, on January 26 and 27, 1985, respectively, and were arrested by the Immigration and Naturalization Service (hereinafter "INS"). The INS instituted deportation proceedings against them on January 28, 1985. AR 364-367.

At a hearing before an immigration judge on April 11, 1985, the Cañas-Segovia brothers conceded deportability and applied for asylum and withholding of deportation pursuant to the 1980 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102. Eligibility for the discretionary relief of asylum is established upon a showing of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . . " 8 U.S.C. §§ 1101(a)(42)(A), 1158(a), Immigration and Nationality Act, as amended (hereinafter "INA") §§ 101(a)(42)(A), 208(a). Eligibility for the mandatory relief of withholding of deportation is established upon proof that the applicant's "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §1253(h)(1), INA §243(h)(1).

Jose and Oscar Cañas-Segovia argued that their imprisonment, and likely disappearance, torture or assassination for adhering to their religious beliefs would

constitute persecution on account of religion and imputed political opinion. AR 230.

The Cañases requested that the immigration judge consider the guidance contained in the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) (hereinafter "*Handbook*"). AR 239-243. The *Handbook* provides significant guidance in interpreting the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (hereinafter "Protocol"), to which Congress sought to conform U.S. law, when it passed the 1980 Refugee Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

Chapter V of the *Handbook* contains a section entitled "Deserters and persons avoiding military service". *Handbook*, pp. 39-41. The *Handbook* states the general rule that prosecution and punishment for draft evasion or desertion does not constitute persecution, but carves out two basic exceptions. The first is when the individual suffers disproportionately severe punishment for the offense on account of race, religion, nationality, membership in a particular social group, or political opinion. *Handbook* ¶169. The second is when the individual's refusal to serve in the military is based on "genuine political, religious or moral convictions, or . . . valid reasons of conscience." *Handbook* ¶170. Individuals who base their claim for asylum on refusal to serve for reasons of conscience must show that their convictions are genuine, and that these convictions "are not taken into account by the authorities of . . . [their home] country. . . . " *Handbook* ¶172.

The immigration judge denied relief to the Cañases, ruling that imprisonment of a Jehovah's Witness for refusing military service is not persecution. Pet.'s App. 58a-59a. The judge declined to consider the *Handbook*'s recommendation, erroneously stating that it was written after the passage of the Refugee Act and that Congress had not taken it into consideration.[2] Pet.'s App. 57a. The judge failed to rule on the question whether the disappearance, torture or assassination of the Respondents would constitute persecution on account of political opinion.

The Board of Immigration Appeals (hereinafter "Board") affirmed the immigration judge's decision. The Board held that it need not consider the *Handbook*'s recommendations, which it characterized as "ambiguous," and ruled that the punishment of religiously-motivated conduct through the application of a uniform statute is

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[2] The Department of Justice has noted that Congress was most likely aware of the contents of the *Handbook* when it passed the Refugee Act in 1980. ("In 1979, the United Nations High Commissioner for Refugees issued a nonbinding guide to aid the Convention's signatory states in determining whether someone was a refugee. . . . We assume that Congress was aware of the criteria articulated in the *Handbook* when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the *Handbook* as an aid to the construction of the Act.") *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 26 (1981) (Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, Immigration and Naturalization Service).

not persecution on account of religion within the meaning of the Refugee Act. Pet.'s App. 43a 47a-48a. The Board held that religious persecution requires proof of the persecutor's intent or motive to target the victim for his religious beliefs or affiliation. Pet.'s App. 46a-47a.

The Board also ruled that the Respondents would not be subject to disappearance, torture or assassination for their perceived disloyalty to the Salvadoran government. Pet.'s App. 50a. Instead of considering and evaluating the extensive documentary evidence on this issue, as presented by the Cañas brothers, the Board made its factual finding upon the basis of its holding in an earlier case, *Matter of A-G-*, Int. Dec. 3040 (BIA 1987). Pet.'s App. 49a-50a.

The Court of Appeals reversed the Board's decision. Pet.'s App. 24a. The panel majority took into consideration the *Handbook*'s guidance when interpreting the meaning of "persecution on account of religion." Pet.'s App. 20a-21a. The majority also considered, but did not rely upon, the concept of an impermissible burden imposed through a neutral statute which exists in First Amendment law. Pet.'s App. 11a. The panel majority ruled that the facial neutrality of the Salvadoran conscription law did not preclude a finding of persecution, and that intent or motive of the persecutor were relevant, but not dispositive. Pet.'s App. 11a, 17a. The majority of the court ruled that the lengthy imprisonment of Respondents for adhering to their beliefs would constitute persecution on account of religion within the meaning of the 1980 Refugee Act. Pet.'s App. 20a-21a.

The entire panel held that the Board's factual finding that the Cañases had not established a clear probability or well-founded fear of persecution was improper because it was based not on the evidence submitted by the Respondents, but on the record in another case. Pet.'s App. 21a, 25a. The panel ruled that the Respondents' evidence established a clear probability of torture and execution on account of imputed political opinion.[3] Pet.'s App. 21a-25a.

The Office of Immigration Litigation filed a Petition for Rehearing with Suggestion for Rehearing En Banc on June 7, 1990. The Court of Appeals denied the Petition on October 9, 1990. The Petitioner filed a timely Petition for Writ of Certiorari with this Court on February 6, 1991.

REASONS FOR DENYING CERTIORARI

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit is correct, supported by both the Refugee Act's plain language and its legislative history. Because Congressional intent is clear,

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[3] The court referred to the numerous affidavits and declarations documenting the extrajudicial sanctions imposed on persons who refuse military service, and stated: "A few examples will suffice. . . . An affidavit was presented from an eyewitness to the extrajudicial torture of an Army deserter. The eyewitness, a conscript himself, first heard army officials accuse the deserter of being an antigovernment guerrilla and then watched as both of the deserter's arms were chopped off." Pet.'s App. 4a.

the Ninth Circuit did not err in refusing to defer to the Board.

A review of the refugee definition in the 1946 Constitution of the International Refugee Organization, 62 Stat. 3037, (hereinafter "IRO"), the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (hereinafter "Convention") and the 1967 Protocol, along with the definition's rich interpretive history, lends additional support to the Ninth Circuit's ruling.

There is no conflict in the circuit courts regarding the issue of refugee status for conscientious objectors, or the related issue of the *Handbook*'s significance in interpreting the Refugee Act.[4] The decision of the Fourth Circuit in *M.A. A26851062 v. INS*, 899 F.2d 304 (4th Cir. 1990), which the Petitioner argues conflicts with the case at bar, conflicts only as to factual findings, and not as to legal determinations. It is not appropriate for this Court to exercise its jurisdiction to resolve factual issues. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Declining to review this decision will not result in an opening of the floodgates, as predicted by the Petitioner,

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[4] Although the *Handbook* is not binding, the federal courts and the Board of Immigration Appeals have consistently referred to it for guidance in interpreting the 1980 Refugee Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Caraval-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984); *Matter of Vigil*, Int. Dec. 3050 (BIA 1988); *Matter of A-G-*, Int. Dec. 3040 (BIA 1987).

because the decision is narrowly drawn and only protects a limited category of persons intended to be protected by the 1980 Refugee Act.

ARGUMENT

I.

THE COURT BELOW CORRECTLY INTERPRETED AND APPLIED THE 1980 REFUGEE ACT

The Petitioner argues that the Ninth Circuit erred in its interpretation and application of the statutory phrase "on account of" and in its favorable consideration of the *Handbook*. Pet. 17-20, 22-23. A brief discussion of the merits will demonstrate that the Ninth Circuit's decision was correct.

a. The plain language and legislative history of the Refugee Act, as well as the historical origins of the definition of refugee in the 1980 Act support the Ninth Circuit's interpretation of the phrase "on account of"

Congress passed the 1980 Refugee Act to bring the U.S. into compliance with its obligations under the Protocol. *See* H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 2, at 19, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 160; S. REP. NO. 256, 96th Cong., 2d Sess. 4, 9, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 144, 149. The refugee definition, which was drawn from the definition

in the Convention and Protocol[5], was intended to give the United States "sufficient flexibility to deal with [refugee] crises. . . . " 126 CONG. REC. 4499 (1980). Individuals to be protected were those who fled "tyrannical or oppressive governmental regimes", 126 CONG. REC. 4501 (1980), including "prisoners of conscience." 126 CONG. REC. 4499 (1980). The Petitioner proposes a definition of refugee which requires a showing of specific intent to persecute. This requirement eliminates the flexibility written into the Act and therefore violates clearly expressed congressional intent.

Congress used the words "on account of" to describe the necessary relationship between the feared persecution and the race, religion, nationality, social group, or political opinion of the victim. The dictionary meaning of "on account of" is "for the sake of, by reason of, because of". Webster's Third New International Dictionary, 13 (1961). This terminology allows for a broad inquiry into the causal relationship between the harm and the victim's status or belief, and expresses the flexibility intended by Congress. Applying the literal definition to the case at bar, the harm suffered by the Cañases is on account of religion, because they suffer such harm "for the sake of, by reason of, because of" their religion.

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[5] The Protocol incorporated the Convention's definition of refugee, and varies from it only by eliminating the requirement contained in the Convention that the refugee causing events occurred prior to January 1, 1951. *Handbook*, p. 4, ¶9.

There is nothing in the language "on account of" to suggest that the motives of the persecutor are determinative. If Congress intended the interpretation urged by the Petitioner, i.e., that "on account of" be determined exclusively in reference to the persecutor's motivation, Congress could have so written the statute.

The definition of refugee in the Convention and Protocol, which was incorporated into the 1980 Refugee Act, has its origins in the Constitution of the International Refugee Organization. The Petitioner argues that the IRO Constitution, the Convention and Protocol, support its reading of "on account of." Pet. 18-19. A review of these instruments, and the events surrounding their drafting, demonstrate that the Petitioner is incorrect.

The IRO Constitution, which was drawn up after World War II, defined as refugee not only victims of Nazism, Fascism and similar regimes, but persons who had "valid objections" to returning to their home country. IRO Constitution, Annex 1, Pt. 1, § A1(a)-(c), § C(1), 62 Stat. 3037, 3049, 3050. A valid objection could be established by a showing of past persecution, or a fear of persecution because of race, religion, nationality or political opinion. IRO Constitution, Annex 1, Pt. 1, § C(1)(a)(i), 62 Stat. 3037, 3050. More importantly, a valid objection could be established by demonstrating political disagreement or dissent to the regime in power. IRO Constitution, Annex 1, Pt. 1, § C(1)(a)(ii), 62 Stat. 3037, 3050-51.

Commentators have remarked upon the generous parameters of the IRO definition. "The basic notion . . . underlying the IRO definition was that an individual who might be described as a victim of state intolerance or

as a genuinely motivated political dissident was a refugee. . . . " Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 Int'l. & Comp. L.Q. 348, 376 (1984). During the drafting of the IRO definition, the United States and its allies were among those groups advocating such a generous definition; they "argued strongly that individuals had the right to choose to migrate in search of personal freedom." *Id.* at 374.

The Convention definition was derived from the IRO, and there is no evidence that it was intended to be narrower in scope. To the contrary, while the IRO referred to persecution for reasons of race, religion, nationality or political opinion, the Convention extended the definition to "membership of a particular social group". Convention, Art.1(A)(2), 189 U.N.T.S. 152.

A noted commentator, A. Grahl-Madsen, referred to the social group category as having a "broader application than the combined notions of racial, ethnic, and religious groups" and wrote that its inclusion was "to stop a possible gap" in the scope of the Convention's coverage. Grahl-Madsen, *The Status of Refugees in International Law*, 219 (1966). The Protocol, which the U.S. signed in 1968, adopted the Convention definition.

The *Handbook*'s recommendation that conscientious objectors be recognized as refugees is an additional and compelling factor for rejecting the Petitioner's interpretation of "on account of". Congress intended to bring U.S. law into conformity with the Protocol, and the *Handbook*, although not binding, is a significant source of guidance for interpreting the terms of the Protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

The *Handbook* does not limit "on account of" in the fashion urged by the Petitioner. It discusses persecution for reasons of religion in ¶¶71-73, and provides, *inter alia*, that religious persecution may take the form of prohibition of religious membership, worship or instruction. The *Handbook* in no way makes an exception for persecution by way of a neutral statute.

Furthermore, the *Handbook* specifically recognizes conscientious objectors under these circumstances to be refugees, and the UNHCR has stood behind the *Handbook*.[6] Contrary to the Petitioner's assertion, the majority of Protocol signatories that have considered the issue, have followed the *Handbook*'s guidance.[7] The Petitioner's

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[6] *See* Letter from Joachim Henkel, Deputy Representative of the UNHCR, to Karen Musalo (January 30, 1986): "UNHCR takes the view . . . that, especially where no alternative to military service exists, significant punishment for refusal to perform military service, based on strong religious or moral convictions, or on political opinion, may be considered persecution." AR 578. The Petitioner contends that the UNHCR has taken inconsistent positions. Pet. 22, 23. But the UNHCR's statements as early as 1981 are consistent with the current position. *See, e.g.*, UNHCR Legal Bulletin, No. 6, March 13, 1981, p.7 "[R]efusal to perform military service, based on strong religious or moral convictions, can today be considered as a valid ground for claiming refugee status under the Convention. . . . " AR 585.

[7] The *Handbook*'s recommendations regarding religious conscientious objectors have been followed in Germany, the Netherlands, Canada and Austria. *See* Decision of German

(Continued on following page)

contention that the *Handbook* is ambiguous is equally unfounded, as a careful reading of the relevant paragraphs will reveal.[8]

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Federal Administrative Court of June 29, 1962 (BVerwG IC 41.60) (finding persecution on account of religion and granting refugee status to member of Nazarene sect sentenced to long term of forced labor for refusal to perform military service) cited at AR 582; Decision of Netherlands Council of State, Ref. LP 80/68 – EG/GRE, 14.3.1980 (finding persecution on account of religion and granting asylum to pacifist who faced sentence of two to three years imprisonment for refusal to serve) cited at AR 583; Decision of Canadian Immigration Appeal Board, No. V86-6161, May 5, 1987 (finding persecution on account of religion, and granting refugee status to Salvadoran Jehovah's Witness who feared forcible induction, and dire consequence, including death, for refusal); Ministerial Directive ("Erlas") of Austria of June 4, 1975, No. 22.501/4-II/0/75 (recognizing asylum for conscientious objectors) cited at AR 584. The *Handbook*'s recommendations regarding refugee status for individuals who face disproportionate punishment have also been followed. *See* Decision of German Federal Administrative Court, March 31, 1981, No. 9 C 6-80 (granting relief to Palestinian who faced disproportionate punishment for refusal to serve in Palestinian Commando group); Decision of Canadian Immigration and Refugee Board, No. V89-00924, June 8, 1990 (granting refugee status to Iraqi who faced disproportionate punishment of execution for desertion); Decision of Canadian Immigration Appeal Board, No. T89-05407, May 31, 1990 (granting refugee status to Salvadoran who feared disproportionate punishment for desertion).

[8] Petitioner argues that "some paragraphs of the *Handbook* suggest that religious conscientious objectors 'may be able to establish a claim to refugee status,' ¶172, while others imply the opposite, see ¶¶167, 173." Pet. 22. The argument that these

(Continued on following page)

The Petitioner states that Congress did not intend "in circumstances such as these" to provide relief for religious or political conscientious objectors.[9] Pet. 20. The Petitioner does not cite to anything in the legislative history to support its assertion, and it cannot. As discussed above, the legislative history of the 1980 Refugee Act supports the opposite conclusion. Although it is true, as the Petitioner states, that this Court has not recognized conscientious objection as a constitutional right, the United States, along with other member states, adopted by consensus a resolution in the United Nations Commission on Human Rights recognizing conscientious objection as "a legitimate exercise of the right of freedom of thought, conscience and religion" protected by the

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paragraphs are in conflict is absurd; ¶167 sets forth the general rule that fear of prosecution and punishment *without more* is not a basis for asylum, while ¶172 sets forth the exception to the general rule for religious conscientious objectors. Paragraph 173 stresses the need to consider the developing trend towards recognition of the right to conscientious objection. This certainly does not imply that such individuals should not be considered as refugees; rather it implies the opposite.

[9] It is not clear what the Petitioner means by its phrase "in circumstances such as these. . . . " It is difficult to imagine a set of more compelling facts. The Respondents in this case are conscientious objectors by reason of religious convictions, a basis for objection that has long been accepted in the United States. They are members of the Jehovah's Witnesses, a religion that is known for its unwavering position of conscientious objection, and the harm they face is not simply imprisonment, but torture or execution.

Universal Declaration of Human Rights,[10] G.A. Res. 217(111), U.N. Doc.A/810, at 7 (1948), and the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) (entered into force, Mar. 23, 1976). *Draft Report of the United Nations Commission on Human Rights*, U.N. Doc. E/CN.4/1989/L.10/Add.15 (March 9, 1989) For the text of the resolution, *see* U.N. Doc. E/CN.4/1989/L.11/Add.8 (March 9, 1989).[11]

b. The Board's interpretation is entitled to little deference because it is contrary to Congressional intent, and it is neither longstanding nor consistent

The Petitioner contends that the Ninth Circuit should have deferred to the Board in its interpretation of the statutory phrase "on account of." Pet. 23. The Board's interpretation is not entitled to deference because it contradicts the clear intent of Congress, as discussed in

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[10] Congress clearly intended to provide protection to individuals in the exercise of those rights contained within the Universal Declaration of Human Rights. *See* S. REP. No. 256, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2, 146-7 (in determining which refugees are of "special concern" to the United States, Congress has "respond[ed] to the human rights concerns embodied in the Universal Declaration for [sic] Human Rights."

[11] This resolution was introduced by Spain, and sponsored by Austria, Canada, Costa Rica, France, Germany, Hungary, the Netherlands, Spain, and Sweden. Subsequently, Portugal and the United Kingdom joined on as sponsors. It was adopted by consensus, and the only country that stated it would have voted against the resolution had it gone to a vote was Iraq.

section II.a.[12] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 476 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") *See* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2092 (1990) (noting that *Chevron* "recognizes the primacy of legislative instructions over administrative will.")

Furthermore, this Court has held that agency positions which are inconsistent are entitled to little deference. *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n.30 ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.") *See also*: *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 431 (1986) (where an agency's definition of a statutory term had been "developed and interpreted . . . for many years within the framework of the complex

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[12] In addition, the plain language of the statute indicates that Congress *did not* intend to delegate to the INS the task of interpreting the substantive terms of the Refugee Act. The authority delegated to the Attorney General was specifically limited to the establishment of procedures for applying for asylum. *See* 8 U.S.C. §1158(a) ("The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . . ") A recurrent theme in the legislative history was the concern of Congress about the unfettered discretion over refugee admissions vested in the Executive branch. *See* Anker and Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 34, 36, 47-48, 88-89 (1981).

statutory scheme . . . " it was entitled to considerable deference) *Chemical Mfrs. Ass'n. v. Natural Resources Defense Council*, 470 U.S. 116, 134 (1985) (affirming agency's position, noting that "we are not dealing with an agency's change of position with the advent of a different administration, but rather with EPA's consistent interpretation since the 1970's.").

The Board's decision in this case is totally inconsistent with its previous decisions. In every published decision prior to its decision in *Cañas* the Board applied the relevant *Handbook* paragraphs in cases involving refusal to serve in the military. *See, e.g., Matter of Vigil*, Int. Dec. 3050, at 10 (BIA 1988); ("[A]n alien who has refused to perform military service could qualify as a 'refugee'. . . . by showing . . . disproportionate punishment. . . . " citing to *Handbook*, p.40); *Matter of A-G-*, Int. Dec. 3040, at 6 (BIA 1987) ("Exceptions to this rule [that it is not persecution to require military service] may be recognized . . . where a disproportionately severe punishment would result . . . or where the alien would . . . be required to engage in inhuman conduct. . . . " citing to *Handbook*, pp.39-41).

Furthermore, the Board has granted asylum and withholding to individuals who merely alleged refusal to serve, without raising reasons of conscience. *See e.g., Matter of Salim*, 18 I&N Dec. 311 (BIA 1982); *Matter of Noory*, BIA unpublished dec. File No. A24 001 415 (argued Oct. 28, 1985); *Matter of Momen*, BIA unpublished dec. File No. A27 026 208 (argued Oct. 10, 1985). The Board's abrupt departure suggests the infusion of improper ideological factors in the decision-making process, which also

violates congressional intent.[13] *See* S. REP. No. 256, 96th Cong., 2d Sess. 4. *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 144. ("[The Refugee Act] finally eliminates the geographical and ideological restrictions now applicable. . . . ")

ARGUMENT II

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE OF CONSCIENTIOUS OBJECTION AS A BASIS FOR ASYLUM

The Petitioner asserts that the Ninth Circuit's decision conflicts with the decision of the en banc Fourth Circuit in *M.A. A26851062 v. INS*, 899 F.2d 304 (1990). To the extent that the two cases involve overlapping issues, *M.A.* is in accordance with the case at bar. The Fourth Circuit accepted, as did the Ninth Circuit, the relevancy of the *Handbook* when applying the Refugee Act to claims based upon a refusal to perform military service.

However, there are significant procedural and substantive differences between the cases. *Cañas-Segovia* came before the court on a petition for review of the Board's denial on the merits, while *M.A.* came before the court on a motion to reopen. The applicants in *Cañas-Segovia* based their refusal to serve on religious convictions, as contrasted with the applicant in *M.A.* who

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[13] In the recent court approved stipulated settlement agreement of a major class action lawsuit, the INS explicitly agreed that ideological factors and foreign policy considerations are not relevant factors in determining eligibility for asylum. *American Baptist Churches v. Thornburgh*, Civ. No. C-85-3255 RFP, slip op. at 2 (N.D. Cal. 1991).

refused due to political convictions. In both cases it was alleged that the refusal to serve would result in imprisonment, disappearance, torture, or death.

The Fourth Circuit ruled that the Board had not abused its discretion in holding that *M.A.* did not meet the requirements of *Handbook* ¶171.[14] *Id.* at 312-314. The Fourth Circuit also held that *M.A.* had not established that any harm that might befall him would be disproportionate on account of any of the enumerated grounds, as required under ¶169. *Id.* at 315.

The Ninth Circuit found that the Cañas brothers had shown the genuineness of their religious convictions, as well as the lack of any exemption, as required by *Handbook* ¶¶170, 172. Pet.'s App. at 20a-21a. Furthermore, the Ninth Circuit found that the harm would be disproportionate, within the meaning of ¶169. Pet.'s App. at 21a-24a.

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[14] *Handbook* ¶171 applies to the individual who refuses military service as a result of his political convictions. It states in relevant part: "It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could. . . . in itself be regarded as persecution." The Board interpreted ¶171 to require a U.N. Resolution condemning the military activity, as well as evidence that the atrocities were the policy of the Salvadoran government, and that M.A. would personally have to participate in them if he served in the military. *Matter of A-G-*, Int. Dec. 3040, at 6, 7 (BIA 1987).

The plain facts of the cases, and the holdings of the two courts, simply do not support the Petitioner's contention that there is a conflict as to legal issues. For this reason, the Petitioner avoids the facts, and relies upon a selective and misleading use of the Fourth Circuit's decision. For example, the Petitioner quotes from *M.A.*: "International law and Board precedent are very clear that a sovereign nation enjoys the right to enforce its law of conscription, and that penalties for evasion are not considered persecution." Pet. 14. This language, with nothing more, creates the impression that the Fourth Circuit rejects all claims based upon a refusal to perform military service, including those of conscientious objectors. This is not the case; this quoted passage from *M.A.* continues by stating that there are exceptions to this general rule. The Fourth Circuit goes on to discuss the exceptions set forth in ¶¶169, 171. *M.A.*, 899 F.2d at 312.

The Petitioner attempts to convince the Court that the Fourth and Ninth Circuits are in conflict by asserting that "M.A. would undoubtedly have been granted relief in the Ninth Circuit" as a political conscientious objector. Pet. 15. Yet the Ninth Circuit itself distinguished the evidence in *M.A.* from the evidence presented in *Cañas*, noting that the applicant in the former case "presented no evidence linking a failure to serve in the military with torture or death" while the Cañases had submitted this evidence. Pet.'s App. 22a.

The Petitioner attempts to bolster its assertion that *M.A.* would have prevailed in the Ninth Circuit by pointing to the court's decision *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990) in which a political conscientious objector was granted relief. The Petitioner's assertion is

somewhat akin to declaring that after the case of *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984) (granting relief to a union member) union members will always be granted relief in the Ninth Circuit. Asylum determinations are extremely fact specific; the facts in *Barraza-Rivera* were quite different from *M.A.* Whereas *M.A.* feared being recruited and ordered to carry out atrocities, and anticipated persecution upon a refusal to do so, the applicant in *Barraza-Rivera*, had been recruited, and while serving in the military was ordered to carry out an assassination, and told that he would be killed if he refused to do so. 913 F.2d at 1446.

In a final attempt to create a conflict in the circuit courts where none exists, the Petitioner focuses on language in the Ninth Circuit decision that "any conscientious objection to military service . . . is an inherently political opinion." Pet. 16. The quoted language, which reflects the position of the UNHCR on this issue, was non-essential to the Ninth Circuit's decision. The court had found, based on the evidence, that the persecution of the Cañases would be for their imputed political opinion. It was superfluous to establish a secondary rationale for the political opinion basis of the holding. Nonetheless, the Petitioner seizes upon this phrase and argues that it conflicts "in principle" with decisions of the First and Eleventh Circuits.[15] It is questionable whether the quoted

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[15] The Petitioner misrepresents the holding of one of the cases it cites. *Umanzor-Alvarado v. INS*, 896 F.2d 14 (1st Cir. 1990) The Government quotes *Umanzor-Alvarado*, as follows: "Insofar as this evidence shows that the Government [of El Salvador] may punish him simply because he will not serve in

(Continued on following page)

proposition conflicts with the First and Eleventh Circuits; it is without doubt, however, that there is no conflict between the imputed political opinion rationale, which is central to the Ninth Circuit's decision, and the First and Eleventh Circuits.[16]

ARGUMENT III

DECLINING TO REVIEW THIS DECISION WILL NOT RESULT IN THE ADVERSE CONSEQUENCES ALLEGED BY THE GOVERNMENT

The Petitioner conjures up a vision of the most dire of consequences if this Court does not review the

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(Continued from previous page)

the Army, however, it does not show that the Government will persecute him because of his political opinion." Pet. 16, n.8. The Petitioner omitted the critical text that follows: *"The matter might well be different were Umanzor able to show that compelled military service would violate genuine pacifist beliefs."* (emphasis added). *Umanzor-Alvarado, supra,* at 15. The Petitioner's selective omission of the text creates an impression one hundred and eighty degrees from the actual meaning.

[16] Two of the cases cited by the Government accept the principle that persecution on account of political opinion includes persecution imposed for opinions not actually held, but imputed to the individual. The third case, *Umanzor-Alvarado,* is silent on this issue. *See Alvarez-Flores v. INS,* 909 F.2d 1, 4 (1st Cir. 1990), ("[C]ase law supports his contention that an imputed political opinion, whether correctly or incorrectly attributed, can constitute a ground of political persecution within the meaning of the Act."); *Perlera-Escobar v. Executive Office for Immigration,* 894 F.2d 1292, 1298 (11th Cir. 1990) (finding applicant failed to establish burden because he "failed to show that the guerrillas have imputed a political opinion to him.")

Cañas-Segovia decision. Individuals fleeing domestic strife will flow through the floodgates, resulting in "a backlash against true refugees." Pet. 13. "[A]ny draft resister subject to punishment for refusing to serve" will be eligible for relief. Pet. 24.

These predictions reveal a profound misunderstanding of the Ninth Circuit's decision. The Ninth Circuit simply ruled that two Jehovah's Witnesses who faced imprisonment, torture and death, for adherence to their religious principles, were refugees within the meaning of the Act.

Since the *Cañas-Segovia* decision, the Ninth Circuit has granted asylum in only one other case on the basis of the ruling. *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990) As discussed in section II, the Petitioner in *Barraza-Rivera*, a forcible conscript in the Salvadoran Army, had been ordered to participate in assassinations, or suffer the same fate for his refusal. *Id.* at 1446. The Ninth Circuit held that his refusal to follow orders to kill innocent persons was based on genuine reasons of conscience and granted him political asylum. *Id.* at 1454. This case hardly represents the opening of the floodgates portended by the Petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1991